FILED

No. (1) 061399 2007

OFFICE OF THE CLERK

In The Supreme Court of the United States

THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION INCORPORATED,

Petitioners,

v.

MICHAEL A. RIPELLINO, LOUISE A. RIPELLINO and NICOLE RIPELLINO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Ryan M. Shuirman
Counsel of Record
YATES, MCLAMB & WEYHER, LLP
Post Office Box 2889
Raleigh, North Carolina 27602
(919) 835-0900

Counsel for Petitioners

THE LEX GROUP DC • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED

WHETHER THE NORTH CAROLINA SUPREME COURT'S DECISION ON THE VALIDITY OF RESPONDENTS' FEDERAL CONSTITUTIONAL CLAIMS FOR VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION IS DIRECTLY CONTRARY TO THIS COURT'S PRECEDENT REGARDING THE FUNDAMENTAL AND ESSENTIAL LEGAL REQUIREMENTS FOR STATING SUCH CLAIMS.

PARTIES TO THE PROCEEDING

Petitioners the North Carolina School Boards Association, Inc., North Carolina School Boards Trust, 1982 North Carolina School Boards Association Self-Funded Trust Fund, 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, and 1997 North Carolina School Boards Association Self- Funded Auto/Inland Marine Trust Fund, defendant-appellants in the state proceedings below, are referred to herein as "Petitioners." Respondents are Michael G. Ripellino, Louise A. Ripellino, and Nicole Ripellino, referred to herein as "respondents." Petitioners' co-defendant in the state proceedings, the Johnston County Board of Education, is referred to herein as "the Board."

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIOARI 1

CITATION TO OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THE NORTH CAROLINA SUPREME COURT'S DECISION ON THE VALIDITY OF RESPONDENTS' FEDERAL CONSTITUTIONAL CLAIMS FOR VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION IS DIRECTLY CONTRARY TO THIS COURT'S PRECEDENT REGARDING THE FUNDAMENTAL AND ESSENTIAL LEGAL REQUIREMENTS FOR STATING SUCH CLAIMS 8

A. Procedural Due Process 10

B. Substantive Due Process 17

C. Equal Protection 22

CONCLUSION 26

APPENDIX

TABLE OF AUTHORITIES

CASES

American Mfrs. Mut. Ins. Co. v. Sullivan,
526 U.S. 40 (1999) 12

Blackwelder v. City of Winston-Salem,
332 N.C. 319, 420 S.E.2d 432 (1992) 9

Board of Regents of State Colleges v. Roth,
408 U.S. 564 (1972) 10, 12

Board of Trustees of the
Univ. of Alabama v. Garrett,
531 U.S. 356 (2001) 24

Central State University v. American Ass'n of
University Professors,
Central State University Chapter,
526 U.S. 124 (1999) 18

Chambliss v. Health Sciences Foundation, Inc.,
176 N.C. App. 388,
626 S.E.2d 791 (2006) 6

City of Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1985) 23, 25

City of Cuyahoga Falls, Ohio v.
Buckeye Community Hope Foundation,
538 U.S. 188 (2003) 25

Collins v. City of Harker Heights, Tex.,
503 U.S. 115 (1992) 17, 22

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 17

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 6

Daniels v. Williams,
474 U.S 327 (1986) 15

Davidson v. O'Lone,
752 F.2d 817 (3d Cir. 1984) 15

Duamutef v. Hollins,
297 F.3d 108 (2d Cir. 2002) 8

Eastern Shore Markets, Inc. v.
J.D. Associates Ltd. Partnership,
213 F.3d 175 (4th Cir. 2000) 9

F.C.C. v. Beach Communications, Inc.,
508 U.S. 307 (1993) 23

Fogle v. Pierson,
435 F.3d 1252 (10th Cir. 2006) 24

Froland v. Coble,
NO. 3:05 CV 280 H
(W.D.N.C. Jan 23, 2006) 12

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 8

Gonzalez v. Chertoff,
454 F.3d 813 (8th Cir. 2006) 22, 23

Grimes v. Pearl River Valley Water Supply,
930 F.2d 441 (5th Cir. 1991).....13

Harris v. Flaherty,
90 N.C. App. 110,
367 S.E.2d 364 (1988).....20

Heller v. Doe by Doe,
509 U.S. 312 (1993) 23

Kelley v. Johnson,
425 U.S. 238 (1976) 18

Kentucky Dept. of Corrections v. Thompson,
490 U.S. 454 (1989) 10, 11

League of United Latin Amer. Citizens v. Clements,
999 F.2d 831 (5th Cir. 1993)..... 8-9

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 15

Martinez v. State of California,
444 U.S. 277 (1980) 15

Meyer v. Walls,
347 N.C. 97,
489 S.E.2d 880 (1997).....20

Nordlinger v. Hahn,
505 U.S. 1 (1992) 22

Papasan v. Allain,
478 U.S. 265 (1986) 8

Paul v. Davis,
424 U.S. 693 (1976) 5

Ripellino v.
North Carolina School Boards Ass'n, Inc.
158 N.C. App. 423,
581 S.E.2d 791 (2006) 6, 14

Rochin v. People of CA,
342 U.S. 165 (1952) 17, 21

Rucker v. Harford County,
946 F.2d 278 (4th Cir. 1991) 17

Saenz v. Roe,
526 U.S. 489 (1999) 20

Sam & Ali, Inc. v. Ohio Dept. of Liquor Control,
158 F.3d 397 (6th Cir.1998) 18, 23

Schneider v. U.S.,
27 F.3d 1327 (8th Cir.1994) 12

Smith v. Kirk,
821 F.2d 980 (4th Cir. 1987) 20

State v. Barfield,
298 N.C. 306,
259 S.E.2d 510 (1979) 20

Town of Castle Rock, Colo. v. Gonzales,
545 U.S. 748 (2005) 10, 11, 14

Tri County Paving, Inc. v. Ashe County,
281 F.3d 430 (4th Cir. 2002).....8, 25

Vance v. Bradley,
440 U.S. 93 (1979).....8

Wessel v. Glendening,
306 F.3d 203 (4th Cir. 2002).....20

Willowbrook v. Olech,
528 U.S. 562 (2000).....22

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V.....*passim*

U.S. CONST. amend. XIV.....*passim*

STATUTES

28 U.S.C. § 1257.....2

42 U.S.C. § 1983.....*passim*

N.C. Gen. Stat. § 115C-42.....14, 15, 16, 21

N.C. Gen. Stat. § 115C-44(b).....24

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the decision of the North Carolina Supreme Court published at 361 N.C. 214, 639 S.E.2d 441, affirming, *per curiam*, the North Carolina Court of Appeals' decision published at 176 N.C. App. 443, 627 S.E.2d 225.

CITATION TO OPINIONS BELOW

The Opinion of the North Carolina Court of Appeals which was on review to the North Carolina Supreme Court is annexed hereto and reported at 176 N.C. App. 443, 627 S.E.2d 225. (Pet. App. __). Petitioners filed a Notice of Appeal of Right to the North Carolina Supreme Court on April 11, 2006, based upon a dissenting opinion in the Court of Appeals, and contemporaneously filed a Petition for Discretionary Review of additional issues not addressed in the dissent. (Pet. App. __). The North Carolina Supreme Court granted petitioners' Petition for Discretionary Review on June 29, 2006, as reported at 633 S.E.2d 822. (Pet. App. __). On January 26, 2007, the North Carolina Supreme Court entered a *per curiam* Opinion indicating that the court was equally divided with respect to the issues addressed in the dissenting opinion, thereby affirming the Court of Appeals' decision on those issues. The Supreme Court additionally held that its grant of petitioners' Petition for Discretionary Review of additional issues was improvidently allowed. The North Carolina Supreme Court's Opinion is annexed hereto and reported at 361 N.C. 214, 639 S.E.2d 441. (Pet. App. __).

JURISDICTION

The North Carolina Supreme Court affirmed the Opinion of the North Carolina Court of Appeals with respect to the issues to be addressed in this petition on January 26, 2007. This petition is timely filed within ninety days of the entry of judgment of the North Carolina Supreme Court. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix to this Petition reproduces the texts of the Fifth Amendment, Fourteenth Amendment, and 42 U.S.C. § 1983. (Pet. App. ___).

STATEMENT OF THE CASE

The North Carolina School Boards Association, Inc. is an association of all local boards of education in North Carolina. The Association operates the North Carolina School Boards Trust, a risk management program which includes various trust funds including the North Carolina School Boards Trust Errors and Omissions/General Liability Trust Fund.[1] The Errors and Omissions/General Liability Trust Fund provides, among other coverage, general liability coverage to participating members, including the Board, in accordance with the terms and conditions of the applicable coverage agreement. (Pet. App. __).

---

[1] Two other trust funds relating to worker's compensation and automobile liability were included as defendants. However, these trust funds are not at issue in this case.

Pursuant to the coverage agreement, the North Carolina School Boards Trust retains the right to assert any applicable defenses available to its members.

This case arises out of the allegations that the Board and Trust Defendants violated respondents' federal constitutional rights in exercising discretion in paying some tort claims against the Board but not others, including respondents' claim, when the defense of immunity was a ailable to the Board in each case. Respondents alleged they were injured by the Board's negligence when a traffic control gate owned and operated by the Board came into contact with a vehicle driven by respondent Nicole Ripellino on the Board's property at Clayton High School in Johnston County, North Carolina. Respondents' April 6, 2001 complaint averred that the Board had a practice of evaluating potential claims against it for purposes of determining whether to assert governmental immunity, and that the Board would assert immunity with respect to some claims, but elect to offer settlements as to others. (Pet. App. ___). In addition to various state constitutional and non-constitutional claims, respondents purported to state claims for violations of the Fifth and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983, on the basis that the Board's discretionary assertion of its statutory right to governmental immunity as to some claims, including those of respondents, violated respondents' rights to due process and equal protection. (Pet. App. __).

Relevant to this petition, the Board and the petitioners moved for judgment on the pleadings as to respondents' federal constitutional claims against the petitioners and the Board on June 23, 2004 and June 24, 2004 respectively. (Pet. App. __). On September 3, 2004, the trial court granted these motions and entered judgment on the pleadings in favor of the Board and petitioners on respondents' federal claims. (Pet. App. __). On appeal, a divided panel of the North Carolina Court of Appeals reversed this judgment, holding, among other things, that the allegations of respondents' complaint stated valid claims under the Fifth and Fourteenth Amendments for violations of federal due process and equal protection. (Pet. App. __). The dissenting opinion disagreed on that issue, concluding instead that the factual allegations of respondents' complaint failed, as a matter of federal constitutional law, to state valid claims for violations of procedural due process, substantive due process, and equal protection. (Pet. App. __).

On April 11, 2006 and April 6, 2006 respectively, the petitioners and the Board filed Notices of Appeal of Right to the North Carolina Supreme Court based upon the issues addressed in the dissenting opinion, and specifically, whether the allegations of respondents' complaint stated valid claims under the Fifth and Fourteenth Amendments for violations of federal procedural and substantive due process and equal protection. (Pet. App. __). Petitioners and the Board contemporaneously filed Petitions for Discretionary Review of additional issues not addressed by the dissent, including whether the Board was a "person" within the

meaning of 42 U.S.C. § 1983. (Pet. App. __). The North Carolina Supreme Court granted this petition on June 29, 2006. (Pet. App. __).

On January 26, 2007, the North Carolina Supreme Court entered the *per curiam* Opinion of which the Board and petitioners now seek this Court's review. The North Carolina Supreme Court was equally divided as to whether respondents' complaint stated valid federal constitutional claims for violations of due process and equal protection, thereby affirming the Court of Appeals' decision that respondents indeed stated valid claims in this regard and could proceed with these federal constitutional claims. Additionally, the North Carolina Supreme Court determined that its grant of discretionary review of additional issues had been improvidently allowed, and accordingly did not address whether the Board was a "person" within the meaning of 42 U.S.C. § 1983. (Pet. App. __). Petitioners and the Board now seek this Court's review of the North Carolina Supreme Court's affirmation of the Court of Appeals' holding that respondents' complaint was legally sufficient to state claims for violations of federal due process and equal protection. Petitioners respectfully contend that based upon the failure of respondents' complaint to state any federal constitutional claim, their claim under 42 USC § 1983 fails as a matter of law and the North Carolina Supreme Court's holdings to the contrary should be reversed. *See Paul v. Davis*, 424 U.S. 693 (1976) (petitioners not liable under § 1983 where respondent's theories of recovery were not based upon rights secured to him by the Fourteenth Amendment).

While the North Carolina Supreme Court's decision leaves the matter for further proceedings in the state trial court, its decision is final and conclusive of the issue of the legal requirements for stating a proper claim for violations of federal procedural and substantive due process and equal protection, later review of which may not be had should this case proceed to trial on the merits. *See Chambliss v. Health Sciences Foundation, Inc.*, 176 N.C. App. 388, 392, 626 S.E.2d 791, 794 (2006) (under North Carolina law, denial of judgment on the pleadings not reviewable following trial on the merits). Accordingly, this Court's review of the federal aspects of this decision is proper notwithstanding the interlocutory nature of the overall proceedings. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-81 (1975).

Petitioners note that because respondents' constitutional claims against the petitioners are identical to, and contingent upon, the constitutional claims made against the Board, the petitioners' petition is virtually identical, except as to identification of the parties, to that filed by the Board. *See Ripellino v. North Carolina School Boards Ass'n, Inc.*, 158 N.C. App. 423, 431, 581 S.E.2d 88, 94 (2003) ("Plaintiffs' claims against the trust defendants are related to and contingent upon the claims against the Board").

REASONS FOR GRANTING THE WRIT

The North Carolina Supreme Court's decision in this case affirmed the underlying Court of Appeals' holding that respondents stated valid

federal constitutional claims under the Fifth and Fourteenth Amendments, as enforced by 42 U.S.C. § 1983, based upon allegations that the Board elected to assert its statutory right to governmental immunity in the face of some potential tort claims, including those of respondents, while electing to offer settlements for other claims. The North Carolina Supreme Court so concluded notwithstanding that the face of respondents' complaint failed to contain factual allegations which implicate any legally cognizable and constitutionally protected right, or establish the presence of governmental action so arbitrary that it shocks the conscience and could not have been related to any conceivable legitimate governmental interest. Significantly, neither the North Carolina Supreme Court's decision nor the North Carolina Court of Appeals' majority decision even addressed the fundamental issue of whether respondents had a property right protected by the Fifth and Fourteenth Amendments.

Though the North Carolina Supreme Court determined its grant of discretionary review as to whether the Board was a "person" within the meaning of 42 U.S.C. § 1983 was improvidently allowed, even conceding such (strictly for purposes of argument), its decision to affirm the Court of Appeals' holding that respondents' complaint stated valid federal due process and equal protection claims is wholly and directly contrary to the decisions of this Court, and indeed, an entire well-established body of federal law on these important federal questions. This Court should address and correct this decision in order to preserve essential

consistency in analysis of these important federal questions between North Carolina and federal jurisprudence.[2]

I. THE NORTH CAROLINA SUPREME COURT'S DECISION ON THE VALIDITY OF RESPONDENTS' FEDERAL CONSTITUTIONAL CLAIMS FOR VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION IS DIRECTLY CONTRARY TO THIS COURT'S PRECEDENT REGARDING THE FUNDAMENTAL AND ESSENTIAL LEGAL REQUIREMENTS FOR STATING SUCH CLAIMS.

It is axiomatic that identification of a constitutionally protected right is a prerequisite to a plaintiff's right to sue under 42 U.S.C. § 1983. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). The determination of whether such a constitutionally protected right exists is a question of law, as is an assessment of whether the government's action bears the appropriate relation to a legitimate state interest. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 289 (1986); *Vance v. Bradley*, 440 U.S. 93, 110-12 (1979); *Duamutef v. Hollins*, 297 F.3d 108, 113 (2d Cir. 2002); *League of United Latin Amer. Citizens v.*

---

[2] Indeed, the federal analysis is also determinative of the viability of respondents' complaint as to their purported identical state constitutional claims, as "North Carolina courts have consistently interpreted the due process and equal protection clauses of the North Carolina Constitution as synonymous with their Fourteenth Amendment counterparts." *Tri County Paving, Inc. v. Ashe County*, 281 F.3d 430, 436 (4th Cir. 2002).

Clements, 999 F.2d 831, 871 (5th Cir. 1993). Accordingly, these questions are appropriately resolved by the court on a motion for judgment on the pleadings. For purposes of such review, while the factual allegations of the complaint are taken as true, the legal conclusions to be drawn therefrom are derived from the court as a matter of law. *Eastern Shore Markets, Inc. v. J.D. Associates Ltd. Partnership*, 213 F.3d 175, 180 (4th Cir. 2000).

The North Carolina Supreme Court has held that a governmental entity does not waive its immunity through the payment of a claim. *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 436 (1992). Therefore, the actions of the Board and the petitioners in deciding whether to settle or litigate a claim is not a decision on whether to assert or waive immunity. Such actions, by necessity, must be within the discretionary authority of the governmental entity.

Here, as enumerated below, the factual allegations of respondents' complaint are, under the unambiguous precedent of this Court, *insufficient as a matter of federal constitutional law* to state valid claims for violations of procedural and substantive due process, as well as equal protection. The North Carolina Supreme Court's affirmation of the Court of Appeals' determination to the contrary is wholly erroneous, in direct contravention to numerous decisions of this Court, and must be corrected.

A. Procedural Due Process

In assessing application of procedural due process, this Court has recognized that the first determinative inquiry is "whether there exists a liberty or property interest which has been interfered with by the State." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), this Court addressed the nature of a property interest which is afforded due process protection. The *Roth* court noted that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have *more than a unilateral expectation* of it. He must, instead, have a *legitimate claim of entitlement* to it." *Id.* at 577 (emphasis added). This Court more recently emphasized, citing *Roth*, that "[t]he procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit.' " *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005).

The *Gonzales* court expounded that "[s]uch entitlements are ' "of course, ... not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." ' " *Id.* (citations omitted). Significantly, however, "[t]hat determination, despite its state-law underpinnings, is ultimately one of federal constitutional law. 'Although the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest

rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.' " *Id.* at 757 (citations omitted). "Resolution of the federal issue begins, however, with a determination of what it is that state law provides." *Id.* To this extent, and dispositive of this issue in the present case, the *Gonzales* court expressly observed that "cases recognize that a benefit *is not a protected entitlement if government officials may grant or deny it in their discretion*." *Id.* at 756 (emphasis added).

Thus, in *Gonzales*, this Court held that the respondent did not have a constitutionally protected property interest in police enforcement of a restraining order because, upon review of the relevant statute, the court concluded that "[w]e do not believe that these provisions of Colorado law truly made enforcement of restraining orders mandatory." *Id.* at 760. The court explained that the respondent's "alleged interest stems not from common law or contract, but only from a State's statutory scheme. If she was given a statutory entitlement, the Court would expect to see some indication of that in the statute itself." *Id.* at 749. Indeed, this Court has recognized that a liberty interest cannot be created unless the regulations purportedly granting that right contain " 'explicitly mandatory language,' *i.e.*, *specific directives* to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome *must* follow." *Thompson*, 490 U.S. at 463 (emphasis added) (holding regulations at issue "lack the requisite relevant mandatory language. They stop short of requiring that a particular result is to be

reached upon a finding that the substantive predicates are met.").

The same rationale was applied in *Roth*, wherein the respondent, hired to teach at a university for a fixed term of one year, alleged a due process violation when he was informed without explanation that he would not be rehired for the ensuing year. The terms of the respondent's employment agreement provided only for his employment up to June 30, 1969, and did not provide for contract renewal. "Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment." *Roth*, 408 U.S. at 578. Accordingly, while the respondent "surely had an *abstract concern* in being rehired," he could not have a property interest sufficient to invoke protections of procedural due process. *Id.* (emphasis added); *see also, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59-60 (1999).

Indeed, the Eighth Circuit has aptly held that there can be no constitutionally protected property interest in pursuing a claim or settlement against a governmental entity where the applicable statute "create[s] an *opportunity* to file a claim for settlement, not an *entitlement* to payment of a benefit," and particularly where the governmental entity has not waived its sovereign immunity. *See Schneider v. U.S.*, 27 F.3d 1327, 1333 (8th Cir.1994) (emphasis added); *see also, e.g., Froland v. Coble*, NO. 3:05 CV 280 H (W.D.N.C. Jan 23, 2006) ("The Plaintiff has also failed to state a § 1983 claim for a

due process or equal protection violation. Although the Plaintiff certainly may have hoped that the Defendants would offer a settlement without the necessity of having to file a lawsuit, her expectation does not rise to the level of a constitutional right or entitlement sufficient to establish a due process or equal protection claim.").

Similarly, in *Grimes v. Pearl River Valley Water Supply*, 930 F.2d 441 (5th Cir. 1991), the plaintiffs brought a wrongful death action against the defendant, and argued that the Mississippi sovereign immunity statute, providing defendants with immunity from wrongful death damages, violated their due process rights. *Id.* at 444. In rejecting the plaintiffs' constitutional arguments, the Fifth Circuit observed that while the state wrongful death statute may have created the cause of action, it was "the sovereign immunity statute [which] defined the *property interest*. In essence, the property interest involved in the case at bar is not protected because the [Pearl River Valley Water Supply] is the defendant. State law does not allow suit against the [Pearl River Valley Water Supply]." *Id.* at 444 (emphasis added).

Application of these settled federal principles to the present case leaves no dispute that the North Carolina Supreme Court's affirmation of the Court of Appeals' holding that respondents' complaint stated a valid procedural due process claim is wholly erroneous and in *direct contravention* to this Court's unambiguous precedent on this very issue. Here, as in *Grimes*, the relevant sovereign immunity statute defines the property interest at issue. That statute,

N.C. Gen. Stat. § 115C-42, expressly affords the Board the *right* to assert governmental immunity against tort claims, while simultaneously providing the Board the ability to determine when to *waive* its entitlement to that defense. *See* N.C. Gen. Stat. § 115C-42 (2007) (providing the Board is "hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property" through procurement of liability insurance, but providing that "nothing in this section shall be construed to deprive any local board of education of any defense whatsoever to any such action for damages or to restrict, limit, or otherwise affect any such defense which said board of education may have at common law or by virtue of any statute.").

As such, the Board had every right to assert governmental immunity as a defense to respondents' tort claims. *See* N.C. Gen. Stat. § 115C-42. This very right was upheld by the North Carolina Court of Appeals in its holding in *Ripellino I* that the Board is entitled to governmental immunity on respondents' claims of up to $100,000 and that participation in the North Carolina School Boards Trust was not a waiver of governmental immunity. (Pet. App. ___). This holding was not disturbed on appeal, and therefore constitutes the law of the case. (Pet. App. ___). Just like the statutory provisions at issue in *Gonzales*, N.C. Gen. Stat. § 115C-42 affords the Board *discretion* to determine whether and to what extent it will waive immunity through the procurement of insurance. Respondents' complaint fails to set forth *any* allegations establishing the existence of the "mandatory language" and "specific

directives" discussed above which would remove from the Board's *full discretion* the ability to determine when it might or might not assert an immunity defense. As this Court expressly held in Gonzales, and in light of the Board's statutory grant of discretion to assert immunity, respondents can have nothing more than a *unilateral expectation* that the Board will not assert immunity as a defense to their claims. Respondents' complaint shows no basis upon which respondents have any legitimate claim of *entitlement* to the payment of respondents' tort claim by the Board or the petitioners, and it therefore fails to contain the essential prerequisite allegations of a constitutionally protected property interest.

Furthermore, federal law establishes that state law immunity defenses such as N.C. Gen. Stat. § 115C-42, which operate to bar state law tort claims, do not effect an impermissible deprivation of property. *See, e.g., Daniels v. Williams*, 474 U.S 327, 333 (1986); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982); *Martinez v. State of California*, 444 U.S. 277, 283 (1980); *Davidson v. O'Lone*, 752 F.2d 817, 830 (3d Cir. 1984). In *Martinez*, this Court found that "even if one characterizes [an] immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest..." *Martinez* at 282, 557. Thus, the Board's statutorily granted immunity defense negates the existence of a protected property interest.

Respondents point to no common law rule, contract, statute, or any other source which grants

them the right to have their tort claim paid. The complaint simply alleges a "right to recover for the bodily injury and medical expenses portion of the Ripellino claim." (Pet. App. ___). Indeed, respondent is unable to point to any source granting this property right because N.C. Gen. Stat. § 115C-42 specifically precludes respondent's alleged right to recover from the Board or the petitioners where there is no waiver of immunity through the purchase of liability insurance.

By allowing respondents' due process claims to proceed notwithstanding, the North Carolina Supreme Court has effectively held either (1) respondents do not need to establish a constitutionally protected property interest in order to state a federal due process claim; or (2) respondents have a constitutionally protected property interest in recovering in tort from a governmental entity such as the Board and a risk management program such as the petitioners. Either conclusion squarely contravenes this Court's settled precedent, and will injuriously affect the essential consistency between North Carolina jurisprudence and established federal law on this important federal question. Indeed, the North Carolina Supreme Court's effective conversion of a unilateral expectation of tort recovery against a governmental entity into a constitutionally protected property right essentially abrogates the governmental immunity to which the Board is statutorily entitled. Accordingly, this Court should review the North Carolina Supreme Court's decision as directly contrary to this Court's precedent (and

indeed, a whole body of established federal law) on this important federal question.

B. Substantive Due Process

This Court has repeatedly emphasized "that '[t]he touchstone of due process is protection of the individual against arbitrary action of government' . . . in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citation omitted). The Court has also repeatedly emphasized that "only the most *egregious* official conduct can be said to be 'arbitrary in the constitutional sense.' " *Id.* (citations omitted) (emphasis added). The Court has noted its self-reluctance "to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992). As the *Lewis* court summarized: "[t]o this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which *shocks the conscience*." *Lewis*, 523 U.S. at 846 (emphasis added). The court observed that the "shocks the conscience" test was first formulated in *Rochin v. People of CA*, 342 U.S. 165 (1952), wherein it found the forced pumping of a suspect's stomach sufficient to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct." *Id.*; *see also, e.g.*, *Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991) (substantive due process only protects against state action which is "so arbitrary and irrational, so unjustified by any circumstance or governmental

interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.").

Notably, where the government action at issue does not interfere with fundamental rights, the action is violative of substantive due process only if "respondent can demonstrate that there is no rational connection between the [action]...and the [legitimate government interest]." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). Significantly, under rational basis review, if there is *any conceivable* legitimate governmental interest which supports the contested action, the action cannot be said to be "'arbitrary and capricious' and hence cannot offend substantive due process norms." *Sam & Ali, Inc. v. Ohio Dept. of Liquor Control*, 158 F.3d 397, 403 (6th Circuit 1998). It is irrelevant whether the record contains any evidence of the actual basis for the decision. *See Central State University v. American Ass'n of University Professors, Central State University Chapter*, 526 U.S. 124, 128 (1999) ("The fact that the record before the Ohio Courts did not show that collective bargaining in the past had lead to the decline in classroom time for faculty does not detract from the rationality of the legislative decision.").

As set forth above, as respondents cannot, as a matter of law, demonstrate any constitutionally protected property interest in a monetary recovery or settlement with the Board or the petitioners, there can exist no fundamental right to such a benefit. Therefore, respondents' substantive due process

claim must be dismissed unless the actions of the Board or petitioners could not be rationally related to any *conceivable* legitimate governmental interest, regardless of whether such interest was the *actual* motivation for the Board's assertion of immunity to respondents' claims.

In this regard, respondents' complaint falls far short, as a matter of law, of stating a valid due process claim, as the Board's alleged policy of electing to settle some tort claims but assert immunity as to other such claims clearly could bear relation to a *conceivable* legitimate governmental interest. The Board pled in its answer (properly considered on judgment on the pleadings) that in certain specific circumstances, "such as where defense costs would exceed the costs of settlement and where a non-immune defendant was entitled to coverage," it would elect to settle claims. (Pet. App. __). Similarly, the answer of the petitioners, also affirmatively states that they elect, in certain specific circumstances, to settle claims where "the settlement amount is less than the potential cost of defense or in situations which include a claim against an individual who does not have immunity, or a claim for which the immunity defense is not available." (Pet. App. ___).

These affirmatively pled bases alone establish that the Board and the petitioners' practice in this regard could bear some relation to a conceivable legitimate governmental interest. The Board and the petitioners clearly have a legitimate interest in conserving taxpayer dollars and their limited resources, both financial and legal. Just as North

Carolina courts have recognized the legitimate governmental interest in conserving funds, so too has this Court noted the legitimacy of that interest. *See Saenz v. Roe*, 526 U.S. 489, 506 (1999); *see also, e.g., Wessel v. Glendening*, 306 F.3d 203, 212 (4th Cir. 2002) (noting "legitimate state interest in conservation of scarce funds."); *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987) ("conserving money" constitutes a "legitimate purpose of the State."); *State v. Barfield*, 298 N.C. 306, 319, 259 S.E.2d 510, 523 (1979) (government has legitimate interest "in securing the best utilization of its legal resources."); *Harris v. Flaherty*, 90 N.C. App. 110, 115, 367 S.E.2d 364, 366 (1988) (unnecessary depletion of State funds and resources a legitimate governmental interest). Additionally, that the Board and petitioners might elect to pay claims where an individual defendant within the public school system may not be entitled to the protection of governmental immunity could conceivably be related to what the North Carolina Supreme Court has recognized as a legitimate interest in ensuring that individuals performing jobs of a public nature (such as a school principal or superintendent) be protected from repeated individual exposure to trials and damage awards, lest such persons not be inclined to fill these essential public roles. *See, e.g., Meyer v. Walls*, 347 N.C. 97, 112-13, 489 S.E.2d 880, 888-89 (1997).

In short, because the Board and the petitioners' exercise of discretion in assessing whether to settle certain claims clearly bears some relation to a conceivable legitimate governmental interest, their alleged actions in this regard cannot,

as a matter of law, rise to the constitutionally impermissible level of "shocking the conscience." That the Board and petitioners attempt to handle claims in a financially judicious manner, which may result in the settlement of some claims but not all claims, is not so capricious and unreasonable that it "shocks the conscience." In fact, the Board and petitioners would be remiss if they did *not* attempt to so conserve limited government resources and taxpayer dollars. Their actions do not even approach those present in *Rochin*, wherein this Court formulated the "shocks the conscience" standard. Nor can it "shock the conscience" that Board asserted immunity as to respondents' tort claims where they was *statutorily entitled* to do so. *See* N.C. Gen. Stat. § 115C-42.

The factual allegations of respondents' complaint fail as a matter of law to support a legal conclusion that the Board and petitioners' settlement practices violated federal substantive due process. Respondents' complaint alleges that "upon information and belief, if the immunity doctrine could be raised, it was raised, but thereafter some claims were nevertheless paid." (Pet. App. ___). Therefore, by respondents' own admission in their complaint, the Board asserts immunity whenever possible, and thus, the decision to assert immunity in this or any other case cannot be considered arbitrary or capricious, or shocking to the conscience. The North Carolina appellate courts' legal conclusions to the contrary are entirely unsupported by federal law, are directly contrary to this Court's unambiguous precedent as to the legal requirements for stating a violation of substantive due process,

and effectively and impermissibly, "expand the concept of substantive due process," *Collins*, 503 U.S. at 125, requiring this Court's review.

C. Equal Protection

This Court has explained that " 'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.' " *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). However, "most laws differentiate in some fashion between classes of persons. The Equal Protection Clause ... simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). For purposes of an equal protection analysis, "persons who are in all relevant respects alike" are those "similarly situated." *Id.*

"Similar to a substantive due process review, this Court has held that where a governmental policy or action is alleged to be violative of the right to equal protection, a rational basis test is employed in the absence of a fundamental right or suspect class." *Gonzalez v. Chertoff*, 454 F.3d 813, 818 (8th Cir. 2006). As with substantive due process, governmental action which "neither proceeds along suspect lines nor infringes fundamental constitutional rights *must* be upheld against equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a

rational basis for the classification." *Id.* (emphasis added).

Significantly, under such rational basis review, a government's classification comes "bearing a *strong presumption of validity* . . . and those attacking the rationality of the [governmental] classification have the burden 'to negative every conceivable basis which might support it.' " *FCC Beach Communications, Inc.*, 508 U.S. 307, 314-15 (citations omitted). *See also City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985) (emphasis added) (absent suspect classification, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest). Under such analysis, "it is entirely *irrelevant* for constitutional purposes whether the conceived reason for the challenged distinction *actually* motivated the legislature." *Id.* (emphasis added); *see also, Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (burden is on respondent to "negative every conceivable basis which might support it, whether or not the basis has a foundation in the record"). "In other words, a [governmental] choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315 "Thus, '[t]he burden upon a party seeking to overturn a legislative enactment for irrationally discriminating between groups under the equal protection clause is an extremely heavy one.' " *Sam & Ali, Inc.*, 158 F.3d at 403 (citation

omitted); *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001). [3]

Once again, the North Carolina Supreme Court's decision evinces a fundamental misapprehension of this proper standard. Here, respondents' complaint did not identify any inherently suspect criteria such as race, religion, or sex in attempting to assert discrimination. In fact, respondents did not aver *any* factual basis of discrimination. Rather, respondents attempt to cobble an equal protection claim by averring they were treated differently from other "claimholders." (Pet. App. ___). This does not meet the standard of "similarly situated" persons, which, again, requires identity in "all relevant respects."

Indeed, it is simply "not plausible or arguable" that respondents could be similarly situated in all relevant respects to every other potential tort claimant against the Board. *See Fogle v. Pierson*, 435 F.3d 1252, 1261 (10th Cir. 2006). The nature of tort claims renders it practically inevitable that certain claimants will be dissimilar in some aspects. That the Board and petitioners consider different factors in assessing whether to settle certain claims (as alleged in their answers) is entirely reasonable,

---

[3] Significantly, the North Carolina General Assembly essentially codified this presumption of validity of petitioner's actions in N.C. Gen. Stat. § 115C-44(b) (2006) ("In all actions brought in any court against a local board of education, the order or action of the board *shall be presumed to be correct* and the burden of proof shall be on the complaining party to show the contrary." (emphasis added)).

and indeed necessary. As a result, not every tort claimant is offered a settlement. For example, as pled in the underlying answers, settlement may be offered in cases where individual defendants may not be entitled to the protections of governmental immunity. However, respondents here did not sue any such individuals in the present case, affirmatively establishing that respondents are *not*, in fact, similarly situated to all other tort claimants to whom the Board or petitioners may offer a settlement. Regardless, respondents' complaint does not allege facts establishing that they, their claims or circumstances, were similarly situated to all tort claimants with whom the Board and petitioners have settled, thereby foreclosing a valid equal protection claim. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Tri-County Paving, Inc.*, 281 F.3d at 439-40.

Even if respondents' complaint had alleged factual allegations sufficient to establish that they were similarly situated in all relevant respects to all other tort claimants against the Board, the settlement practices at issue once again bear relation to a *conceivable* legitimate governmental interest, as addressed in detail above with respect to substantive due process. Moreover, a discriminatory intent or purpose is required to establish a violation of equal protection. *City of Cuyahoga Falls, Ohio v. Buckeye Comty. Hope Found.*, 538 U.S. 188, 194 (2003). Respondents' complaint is entirely devoid of any factual allegations which could meet such a requirement.

Simply stated, respondents' complaint altogether failed to allege the presence of the factual circumstances which this Court has held necessary to support a claim for violation of equal protection. The North Carolina courts' decisions to allow such a federal constitutional claim to proceed under such facially invalid allegations is entirely erroneous and contrary to the significant federal constitutional principles espoused by this Court and an entire body of federal constitutional law.

CONCLUSION

The North Carolina Supreme Court's *per curiam* affirmation of the Court of Appeals' determination clearly contravenes the well-established precedent of this Court as to the most fundamental and essential elements of stating valid federal constitutional claims for violations of due process and equal protection. Respondents' complaint wholly failed to contain factual allegations which, taken as true, support a legal conclusion that petitioners violated respondents' Fifth and Fourteenth Amendment rights as enforced through 42 U.S.C. § 1983. The North Carolina Supreme Court's determination that respondents may nevertheless proceed with these federal constitutional claims is directly contrary to established federal law, and renders North Carolina jurisprudence on these important federal questions so inconsistent with this Court's precedent, that review and correction is essential. Accordingly, this petition for certiorari should be granted, and the decision of the North Carolina Supreme Court reversed.

Respectfully submitted,

_/s/_____
RYAN M. SHUIRMAN
Counsel of Record for Petitioner
Yates McLamb & Weyher, L.L.P.
Post Office Box 2889
Raleigh, NC 27602
Tele. (919) 835-0900
Facsimile: (919) 835-0910